



November 20, 2008

TO: Co-chairpersons Senator Steve Warnstadt and Representative Doris Kelley and Members of the Identity Theft Prevention Study Committee

**FROM: Ed Cook, Senior Legal Counsel, Legal Services Division,
Legislative Services Agency**

RE: Identity Theft Prevention — Background Information

I. Charge — Overview

The Legislative Council, pursuant to a request contained in legislation enacted during the 2008 Legislative Session,¹ created the Identity Theft Prevention Interim Study Committee and gave it the following charge:

Assess and review the extent to which personal, identifying information of a resident of this state is in the possession of government or government-affiliated organizations, and which, if disclosed, could render the resident vulnerable to identity theft. Also assess the extent to which public officials, government organizations, and affiliated organizations make available, are in possession of, have access to, or are disclosing or selling such information for compensation. Based upon this assessment and review, the Committee shall develop recommendations relating to these practices.

This memorandum provides legal background information from Iowa law and proposed legislation relative to the charge of the Committee.

II. Identity Theft — Iowa Law Basics

A. Criminal Provisions

Code Section 715A.8 provides that a person commits the offense of identity theft under Iowa law if the person fraudulently uses or attempts to fraudulently use identification

information of another person, with the intent to obtain credit, property, services, or other benefit.

"Identification information" is broadly defined to include, among other items, the person's name, address, date of birth, telephone number, driver's license number, nonoperator's identification card number, Social Security number, student identification number, military identification number, alien identification or citizenship status number, employer identification number, signature, electronic mail signature, electronic identifier or screen name, biometric identifier, genetic identification information, access device, logo, symbol, trademark, place of employment, employee identification number, parent's legal surname prior to marriage, demand deposit account number, savings or checking account number, or credit card number.

A person commits a class "D" felony if the value of the credit, property, or services exceeds \$1,000 or an aggravated misdemeanor if the value of the credit, property, or services does not exceed \$1,000.

B. Civil Enforcement

In addition, a person suffering a pecuniary loss as a result of an identity theft by another person may bring a civil action against such other person to recover \$5,000 or three times the actual damages, whichever is greater; reasonable costs for repairing the victim's credit history or credit rating and for bringing a civil or administrative proceeding to satisfy a debt, lien, judgment, or other obligation of the victim; and punitive damages, attorney fees, and court costs.²

C. Notification Requirements — Breach of Security

1. Overview. New Code Chapter 715C, enacted during the 2008 Legislative Session, aims to protect individuals from identity theft by providing for the notification of a breach in the security of personal information maintained in computerized form.

Code Section 715C.2 requires a person who owns or licenses computerized data that includes specified personal information to provide notice of any breach of the security of the data to a consumer resident of this state whose personal information was or may have been acquired by an unauthorized person. A person who maintains or possesses personal information on behalf of another person is also required to notify the owner or licensor of the information of any breach in security if a consumer's personal information was included in the information breached.

For purposes of the notification requirement, "personal information" is defined to mean an individual's first name or first initial and last name in combination with the individual's social security number; driver's license number or other unique identification number created or collected by a government body; financial account number, credit card number, or debit card number, unique electronic identifier or routing code, in combination with any required security code, access code, or password that would permit access to an individual's financial account; or unique biometric data.

If a security breach occurs, notice to the applicable consumer is made by mail, electronic notice, or by a substitute method if costs become excessive. Substitute notice can be made by electronic mail, posting a notice on the applicable Internet website, or through the major statewide media.

2. Enforcement. A violation of the requirements of this new chapter is an unlawful practice pursuant to Iowa's Consumer Fraud Act (Code Section 714.16). In addition, the Attorney General may bring a civil action on behalf of an injured person.

3. Applicability to Governmental Entities. While the new law defines "person" broadly to include governments and governmental subdivisions,³ the definition of personal information specifically excludes information from federal, state, or local government records lawfully made available to the general public.

III. Public Records Law — Iowa Basics

A. Overview

Issues relative to government dissemination of personal information are largely governed by Code Chapter 22 concerning the examination of public records. The chapter applies broadly to government bodies at the state and local level, and is also made applicable to entities formed to exercise governmental powers under Code Chapter 28E. In addition, Code Chapter 22 defines public records to include all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any government body. As a consequence of this broad definition of a public record, almost any information collected by government, including personal information, is subject to disclosure to the public under the provisions of Code Chapter 22.

B. Public Records Policy

Code Section 22.2 establishes the basic public policy governing public records and their availability to the public. The section establishes the broad principle that, "Every person shall have the right to examine and copy a public record" In addition, Iowa law places no general restriction on the ability of the requester to publish or otherwise disseminate a public record or the information contained in a public record.⁴ Furthermore, the right to examine a public record includes the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record.⁵ Finally, the section prohibits a government body from evading their responsibility to provide access to public records by contracting with a nongovernment body to perform any of its duties or functions.⁶

C. Access to Public Records — Costs Chargeable

1. Overview. Pursuant to the policy established in Code Section 22.2 that the public should have access to public records, Code Sections 22.3 and 22.3A provide specific guidance concerning the examination and copying of the public records and the authority to charge requesters "reasonable fees."

2. Costs — General Rule. Code Section 22.3 sets the basic policy that the lawful custodian of a record is authorized to charge the requester of a record with the expenses incurred in providing access to that public record. However, the authority to charge costs is limited.⁷ Specifically, the costs charged must be reasonable, cannot exceed the actual cost of providing the record, and are limited to only those costs directly attributable to making the record available. Excluded from costs that may be charged are such ordinary expenses or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office of the lawful custodian.

3. Electronic Access. The advent of electronic storage and access to public records has created new challenges relative to providing access to public records. Still, Iowa law clearly provides that utilization of an electronic data processing system for the storage, manipulation, or retrieval of public records does not modify the government body's duty to make those public records accessible to the public nor does it change the basic requirement that any costs chargeable to a requestor for electronic access to a record be limited to the costs directly incurred in producing that record.⁸ However, Code Section 22.3A does provide guidance in discerning how electronic access to a public record should be made available and at what cost.

If the record is provided in an electronic format, Code Section 22.3A requires that the record be made available in a format useable with commonly available data processing or database management software. If the data provided is separated from the underlying data processing software, the cost charged to the requester is to be determined in the same manner as access to other public records. However, a government body may establish payment rates and procedures required to provide access to data processing software, regardless of whether the data processing software is separated from or combined with a public record, in an amount that cannot be more than that required to recover direct publication costs, including but not limited to editing, compilation, and media production costs incurred in developing the data processing software and preparing the data processing software for transfer to the person.

D. Fair Information Practices Act

Code Section 22.11 requires state agencies to adopt rules establishing the policy of the agency in providing the public with access to public records. The rules shall establish the procedures for making public records available, a description of which records are public records and which are confidential and the legal basis for that determination, and the extent to which personally identifiable information is collected by the agency and the legal authority for that collection. If the rules do not identify personally identifiable information to be collected by that state agency, the agency is prohibited from collecting that information.

E. Confidential Records — Personal Information

Code Section 22.7 describes those public records that are to be kept confidential unless otherwise ordered by a court, by the lawful custodian of the records, or by another

person duly authorized to release such information. In regard to personal information, the section deems as confidential the personal information in confidential personnel records,⁹ certain records of the treasurer and the Department of Administrative Services that include Social Security numbers,¹⁰ records which if disclosed might jeopardize the security of an electronic transaction,¹¹ and personal information contained in housing assistance records.¹² In addition to Code Section 22.7, other provisions of Iowa law may establish that a particular record may be deemed confidential and not subject to disclosure. Examples include Department of Public Health trauma care system medical records,¹³ military personnel records,¹⁴ sex offender registry records,¹⁵ and deferred judgment docket records.¹⁶

However, Iowa law does not establish a blanket policy providing that public records that include Social Security numbers or personally identifiable information are deemed confidential.

IV. County Recorders — Electronic Document Recording

A. History — Iowa Land Records

In 2003, legislation was enacted to provide the means for developing county and statewide Internet websites to provide electronic access to records and information.¹⁷ To finance the cost of establishing electronic access to records, an additional five dollar recording fee for each recorded transaction was established for the fiscal year beginning July 1, 2003, and an additional one dollar recording fee was established for each fiscal year thereafter.¹⁸ Moneys received from the additional recording fee are deposited in a local government electronic transaction fund to be used for developing Internet websites.

In 2005, legislation was enacted providing that the board of supervisors of each county, on behalf of each county recorder, execute a Code Chapter 28E agreement with the Iowa County Recorders Association for the implementation of the County Land Record Information System (CLRIS).¹⁹ As a result of this directive, a Code Chapter 28E entity was created to govern and coordinate the Iowa Land Record Information System and electronic services web portal. The entity was named the Electronic Services System (ESS) and a governing board was created. In addition to directing the establishment of the Code Chapter 28E entity, the legislation prohibited county recorders from collecting fees for viewing, accessing, or printing documents in the county land record information system until authorized by the General Assembly.²⁰

Pursuant to Code Section 331.605C, the Internet website iowalandrecords.org was launched, providing access to real estate land records filed with county recorders.

B. Document Requirements — County Recorders

As a general matter, access to documents filed with the county recorder is governed by Code Chapter 22. In addition, Code Section 331.606A establishes certain specific guidelines relative to the inclusion of personally identifiable information in documents filed with the county recorder.

For documents executed on or after July 1, 2007, and filed with the county recorder, the preparer cannot include an individual's personally identifiable information in that document. "Personally identifiable information" is defined to mean an individual's social security number, checking, savings, or share account number, or credit, debit, or charge card number. If personal information is included in the document, the preparer is liable to that individual for up to \$500 in actual damages for each act of recording. In addition, if personal information is included in a document available on the recorder's Internet website, the recorder is required to establish a procedure for redacting the personal information from the website upon request of the individual affected.

Finally, the provisions of Code Section 331.606A do not apply to a preparer of a state or federal tax lien, military separation or discharge record, or death certificate. In addition, a military record or death certificate recorded with the recorder is prohibited from being made accessible through the Internet.

V. 2008 Proposed Legislation

A. Senate Study Bill 3164/Senate File 2378/Senate File 2411

This proposed legislation, recommended by the Freedom of Information, Open Meetings, and Public Records Interim Study Committee (2007 Interim), would have made significant statutory changes relative to open records and public meetings. Specific to the issue of the confidentiality of personal information maintained by a government body under Code Chapter 22, the proposed legislation would have deemed "information about and linked to an identified or identifiable person that, if disclosed to the general public, would constitute an unwarranted or undue invasion of personal privacy or that would present a clear and serious danger of facilitating identity theft or other criminal activity in relation to that person a confidential record."

B. Senate Study Bill 3116/House Study Bill 617

This proposed legislation, introduced by the Citizens' Aide/Ombudsman, would have required a government body that collects, maintains, or processes a public record containing personal information to disclose any breach of security to an affected individual upon discovery or notification of the breach. Senate File 2308, which was enacted, provided that personal information lawfully obtained from a public record did not trigger a requirement on behalf of the government body to provide notice of that disclosure.

C. House File 2494

This proposed legislation by Representative Sands and others would have required the Department of Revenue to provide notice to an individual if the Department suspects that the individual's personal information is being misused.

D. House File 2504

This proposed legislation by Representative Van Fossen and others would have directed government bodies to make reasonable efforts to exclude Social Security numbers from public records by excluding Social Security numbers from documents that may be readily observed by the public, by giving individuals the option to not submit a Social Security number to the government body, and by removing a social security number from a public record following a request by the individual.

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¹ 2008 Iowa Acts, ch 1154, § 3; (SF 2308).

² Iowa Code § 714.16B.

³ Iowa Code § 715C.1(10).

⁴ Iowa Code § 22.2(1).

⁵ Iowa Code § 22.2(1).

⁶ Iowa Code § 22.2(2).

⁷ Iowa Code § 22.3(2).

⁸ Iowa Code § 22.3A(2)(a).

⁹ Iowa Code § 22.7(10-11).

¹⁰ Iowa Code § 22.7(32).

¹¹ Iowa Code § 22.7(38).

¹² Iowa Code § 22.7(57).

¹³ Iowa Code § 147A.26.

¹⁴ Iowa Code § 331.608.

¹⁵ Iowa Code § 692A.13(8).

¹⁶ Iowa Code § 907.4.

¹⁷ 2003 Iowa Acts, ch 178, § 25; codified at Iowa Code § 331.605C.

¹⁸ Iowa Code § 331.605C.

¹⁹ 2005 Iowa Acts, ch 179, § 101.

²⁰ This provision was eventually codified at Iowa Code § 331.605B(2).